

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1986 of 1987

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
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INTERNATIONAL ENTERPRENOURS

Versus

O N G C

Appearance:

MR ARUN H MEHTA for Petitioner
MS VASUBEN P SHAH for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

Date of decision: 03/03/2000

ORAL JUDGEMENT

The petitioner submitted tender for supply of steel plates to respondent Oil & Natural Gas Commission (ONGC) . The respondent Commission did not accept the tender on the ground that, no performance guarantee and

income tax clearance certificate as required by the tender conditions were submitted. The respondent Commission forfeited the earnest money in sum of Rs.1,10,000/- . Learned counsel appearing for the petitioner firstly made an attempt to assail the action of the Commission in rejecting the tender contending that it was done on unsubstantial grounds. It is contended that, under tender conditions there was no requirement of furnishing any income tax clearance certificate. It is also submitted that the telegrams were received by the petitioner demanding Bank Guarantees in different amounts and there was no breach of any tender conditions on the part of the petitioner to justify rejection of the tender.

2. The other alternative submission made on behalf of the petitioner is that, towards earnest money an amount of Rs.1,10,000/- in the shape of Bank Guarantee was furnished. Since there was no breach on the part of the petitioner and no loss caused to the Commission, the earnest money of Rs.1,10,000/- could not have been forfeited.

3. I also heard learned counsel Ms. Brahmbhatt appearing for the Commission, who supports the action taken by the Commission. It is submitted that as the performance guarantee and income tax clearance were not furnished as required, the tender was rightly rejected. It is also submitted that under the terms & conditions of the tender document and the Bank Guarantee, the amount of earnest money could be forfeited.

4. This Court has examined the tender conditions. There is no condition therein requiring submission of income tax clearance certificate. For performance guarantee, telegrams were sent to the petitioner. In the first telegram the amount demanded was RS.51,000/- and subsequently a sum of Rs.1,02,000/-was demanded. Petitioner then submitted the Bank Guarantee in sum of Rs.1,02,000/-. There was no justification, therefore, for rejecting his tender. This Court however cannot grant him relief of awarding the contract. After rejection of tender of the petitioner, the work was awarded to a third party and supplies have been made. The contract thus stands carried out.

5. The alternative relief claimed on behalf of the petition however deserves to be granted. This Court finds that, there was no breach on the part of the petitioner. Assuming that, there was a breach, in accordance with section 73 and 74 of the Contract Act the

amount of earnest money was liable to be forfeited only to the extent of loss suffered by the Commission as a result of the alleged breach. Without proof of loss either before the arbitration forum by invoking arbitration clause in the contract or in civil suit, the earnest money furnished in the form of Bank Guarantee could not have been forfeited. Learned counsel for the Commission referred to a tender document Condition No.14 which reads as under:-

" 14. If the commission finds that materials are not of the correct quality or not according to specification required or otherwise not satisfactory owing to any reason of which this commission will be the sole judge, the Commission will be entitled to reject materials, cancel the contract and by its requirements in the open market at the risk and cost of the suppliers reserving always to itself to the right to forfeit the security deposit placed by the supplier or the due fulfillment. "

6. In the instant case the tender was rejected at the threshold. No supplies were made and there was no question of materials being supplied of inferior quality. Condition No.14 quoted therefore is not attracted. Reliance is then placed on the terms & conditions of Bank Guarantee. As has been mentioned above, the earnest money was given in the shape of a Bank Guarantee. Under the terms of the guarantee bond, the Bank was bound to pay the amount. The earnest money thus has been collected by the Commission through the Bank by enforcing the Bank Guarantee. The legal rights of the parties would nonetheless be regulated by the provisions of the Contract Act. This Court would have relegated the petitioner to civil suit for recovery of the amount of earnest money, but it cannot be lost sight of that the Commission is a public organisation falling within the definition of 'State' under Article 12, and in the absence of any legal justification, it cannot be allowed to retain the earnest money of the petitioner. The Bank Guarantee was encashed in 1987 and the amount was through out with the Commission for all these years. Without saying anything about the interest earned on the said amount, the respondent Commission (ONGC) now should refund the whole amount of earnest money to the petitioner.

7. Consequently the petition only partly succeeds, by directing respondent ONGC through respondent No.2 its Sr. Deputy Director to refund a sum of Rs.1,10,000/to

the petitioner, the forfeiture of which is held to be illegal by this Court. Rule made absolute to the aforesaid extent. In the circumstances of the present case there shall be no order as to cost. If the amount is not paid within a period of two months, it shall carry the interest at 12% per annum until payment. There shall be no order as to costs.

DT: 3-3-2000

(D.M. Dharmadhikari, C.J.)

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